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CHARLES ELMORE COMPTON

IN THE
Supreme Court of the United States
OCTOBER TERM, 1944.
No. 239

THE STATE OF NORTH DAKOTA,
Petitioner,
vs.
JOHN A. STANTON.

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT AND BRIEF IN SUPPORT THEREOF

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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CIRCUIT**

The Attorney General of the State of North Dakota, for and on behalf of the State of North Dakota, prays that a Writ of Certiorari issue to review the judgment of Circuit Court of Appeals for the Eighth Circuit entered in the above case on June 3rd, 1944, affirming the order of the District Court for the District of North Dakota of September 29th, 1943.

OPINIONS BELOW

The District Court wrote an opinion (R. 89). The opinion of the Circuit Court of Appeals is reported in 142 F. (2d)

JURISDICTIONAL STATEMENT

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 3rd, 1944. The jurisdiction of this court is invoked upon two grounds:

1. The court below, by its judgment, has applied Section 75 (s) of the Bankruptcy Act (49 Stat. 943-945) so as to take petitioner's property without due process in violation of the Fifth Amendment to the Constitution of the United States.

2. The court below has so applied the act above referred to as to deny to the State of North Dakota acting in its sovereign capacity as trustee of the permanent school funds arising from the land grant made by the Enabling Act, approved February 22nd, 1889, the protection of the contract or compact existing between the United States and the State of North Dakota by reason of the acceptance of said land grant and the constitutional guaranty of the protection and administration of said fund. (Enabling Act, 25 U. S. Stat. at Large, p. 676, Article IX, Constitution of North Dakota.) The Circuit Court of Appeals, by its judgment sought to be reviewed, has decided two important questions of federal law, which have not been, but should be, settled by this court.

QUESTIONS PRESENTED

Two questions are presented:

1. May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made, thereby depriving such certificate holder of his property without due process of law?

2. Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant by the State and its guaranty to protect and

administer the funds arising from the sale of such lands as a trust fund?

STATUTES INVOLVED

Enabling Act, approved February 22nd, 1889 (25 Stat. at Large 676), Articles IX and XVI (Sec. 205), North Dakota Constitution, and Section 75 (s) of the Bankruptcy Act (49 Stat. 943-945).

STATEMENT

On July 9th, 1928, the bankrupt, J. A. Stanton, applied to the School Land Department for a loan of school funds in the sum of \$5,000.00. In such application, which was verified by his oath, he stated the conservative value of the land to be \$14,000.00, and of the improvements \$5,500.00 (R. 39-41). With such application, he presented an appraisal wherein the land was valued at \$12,000.00 and the improvements at \$5,600.00 (R. 55). On this application and appraisal, the bankrupt was loaned the sum of \$5,000.00, the note and mortgage being dated July 11th, 1929. On August 31st, 1940, the mortgage was foreclosed by sheriff's sale and the State of North Dakota became purchaser of the mortgaged premises for the sum of \$6,953.13, the full amount then due upon the the loan. The State held the sheriff's certificate of foreclosure sale at the time the bankrupt filed his original petition in bankruptcy, and is now the owner and holder of such certificate. The property was valued by the Conciliation Commissioner at \$2,800.00, and the bankrupt's right to redeem at that figure is fixed by the judgment we are now seeking to review. By the laws of North Dakota, redemption from the foreclosure sale may be made by the mortgagor or any subsequent lienholder by paying the purchase price, with interest at six (6) per cent to date of redemption.

(Secs. 8085, 7754, Compiled Laws for 1913; Ch. 211, Laws of 1933.) The amount required to redeem by the State law now exceeds \$8,550.00, hence redemption for \$2,800.00 means an immediate loss to the school fund of over \$5,750.00.

REASONS FOR GRANTING WRIT

On its appeal to the Circuit Court the State urged the two propositions:

1. Redemption from holder of foreclosure sale certificate cannot be made for less than amount fixed by state law without depriving the certificate holder of his property without due process in contravention of the Fifth Amendment to the Constitution of the United States.

2. Congress, not having expressly so provided, cannot be held to have intended by Section 75 (s) of the Bankruptcy Act to so apply the law as to violate the contract or compact existing between the Federal Government and the State by reason of the land grant made by the Enabling Act and the acceptance thereof under the conditions and limitations of the grant by its Constitution.

The Circuit Court of Appeals, as we read its opinion, holds that both of these questions have already been determined conclusively by the Supreme Court adversely to the State, your petitioner. With all respect due to the court, we just as firmly assert that neither of these questions has ever been determined by this court and particularly not by the cases cited in its opinion by the Circuit Court.

The Supreme Court in *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106, distinctly and unequivocally held that "the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." And in that case, as well as in all subsequent cases considered by the

Supreme Court, the court was considering only the rights of a mortgagor and a mortgagee under a subsisting mortgage. In this case, there is no mortgage involved, since by the foreclosure sale the mortgage debt has been fully paid and now the only rights involved are those of purchaser and redemptioner. *Harrison vs. Griffin*, 32 N. D. 188, 196, 155 N. W. 655, 657; *North Dakota Horse and Cattle Co. vs. Scrungard*, 17 N. D. 466, 490, 117 N. W. 453, 463. The purchaser now holds a property right in the land, and not simply a lien thereon. This property right can only be taken away by due process of law, and that due process is by the exercise of the statutory right of redemption. And in no case has this court considered the question of the respective rights of Congress and the State Legislature under the contract or compact above referred to. That such a contract or compact exists is distinctly held by several State courts.

State vs. Whitney, 66 Wash. 473, 120 Pac. 116, 121.

Newton vs. State Board of Land Commissioners, 37 Idaho 58, 219 Pac. 1053.

Magnolia Petroleum Co. vs. Price, 86 Okla. 105, 206 Pac. 1033, 1036-7.

City of Corinth vs. Robertson, 125 Miss. 31, 87 So. 464.

Erickson vs. Cass County, 11 N. D. 494, 506, 92 N. W. 841.

United States vs. Fenton, et al., 27 F. Supp. 816 (D. C., Idaho, S. D.).

And many states have as conclusively held that such compact may not be violated by the State Legislature.

Erickson vs. Cass County, supra.

State vs. Divide County, 68 N. D. 708, 283 N. W. 184.

State vs. Towner County, 68 N. D. 629, 283 N. W. 63.

Murtaugh vs. C., M. & St. Paul Ry. Co., 102 Minn. 52, 112 N. W. 860.

Newton vs. Weiler, 87 Mont. 164, 286 Pac. 133.

O'Brien vs. Wilson, 51 Wash. 52, 97 Pac. 1115.

State vs. Whitney, *supra*.

United States vs. Fenton, *supra*.

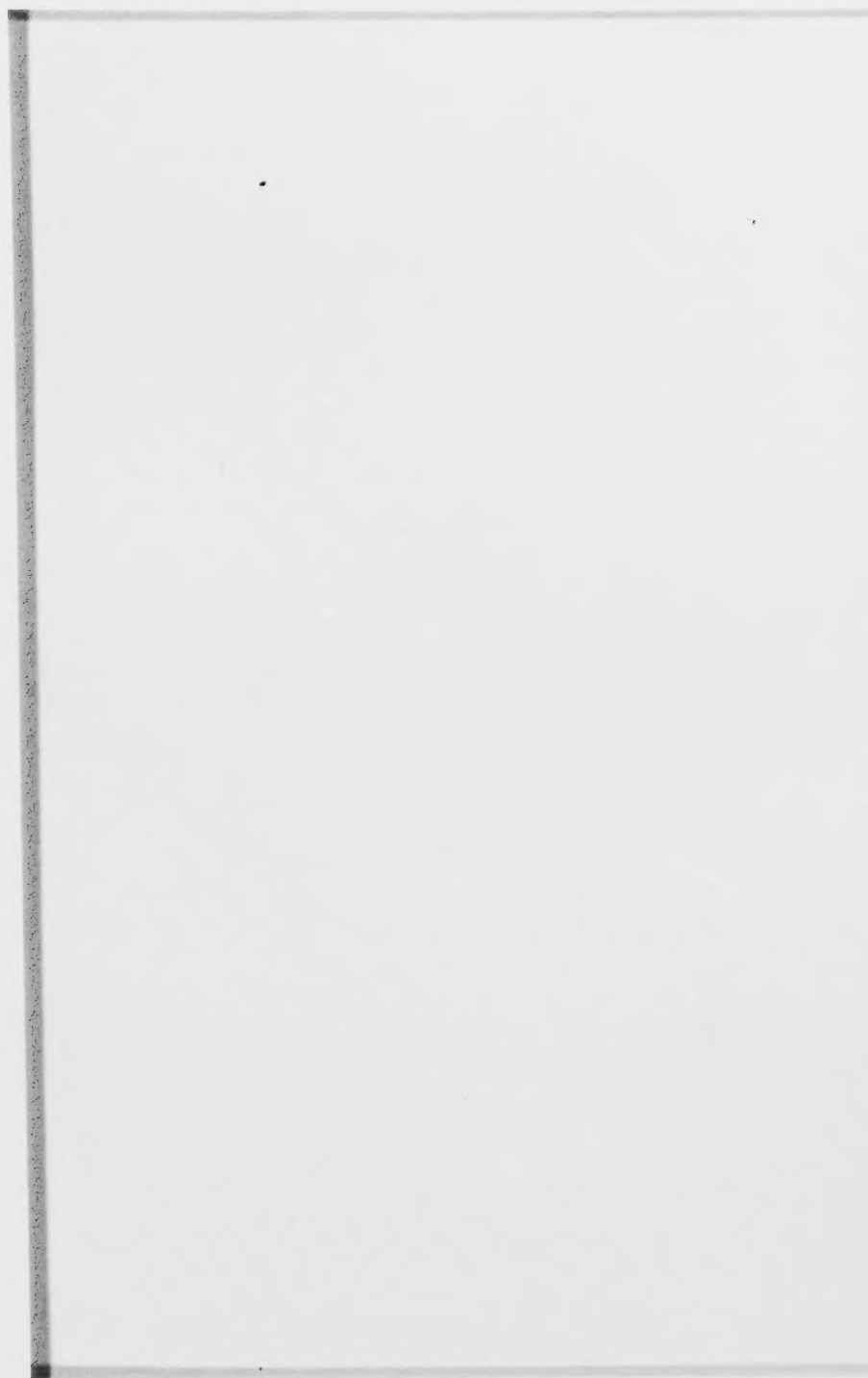
In view of the fact that other cases are now pending in which these questions are involved, and since Congress has recently extended the life of Section 75 of the Bankruptcy Act, others are apt to arise since the State has millions of dollars of its school funds invested in farm mortgage loans, it is of considerable importance that these questions be finally determined by this court.

CONCLUSION

The decision below, we believe, erroneously determines questions which, when applied to this case and others now pending, results in an arbitrary taking from the State a considerable amount of the trust fund given it by the Federal Government without due process of law and in violation of a compact which binds both Congress and the Legislature to protect the fund. Therefore, we believe that this petition for a Writ of Certiorari should be granted.

June 12th, 1944.

THE STATE OF NORTH DAKOTA,
Petitioner,
 BY ALVIN C. STRUTZ,
Attorney General,
 P. O. SATHRE,
 C. E. BRACE,
Assistant Attorneys General,
Counsel for Petitioner,
Bismarck, North Dakota.



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**PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

STATEMENT OF FACTS

Briefly, the facts are as follows:

On July 11th, 1929, the lands involved herein were mortgaged to the State of North Dakota to secure a loan of \$5,000.00 of the State School Fund, derived from sale of lands granted to the State by Congress by the Enabling Act of February 22nd, 1889. This mortgage was foreclosed and the property sold to the State for the amount due on the mortgage and costs amounting to \$6,953.13, on August 31st, 1940 (R. 6). Petition of farmer-debtor was filed August 28th, 1941, after foreclosure sale (R. 1). On revaluation, the Conciliation Commissioner valued the property for purposes of redemption at \$2,800.00 (R. 86). This valuation was approved by the District Court (R. 91). And such valuation was approved by the judgment of the Circuit Court of Appeals by its judgment of June 3rd, 1944.

POINTS URGED ON THE PETITION FOR A WRIT OF CERTIORARI

1. May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made, thereby depriving such certificate holder of his property without due process of law?

2. Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant by the State and its guaranty to protect and administer the funds arising from the sale of such lands as a trust fund?

ARGUMENT

Without discussion in detail of the authorities relied upon by the petitioner on the merits, we will call the court's attention briefly to the principal points and the supporting authorities.

I. Under the law of North Dakota, redemption from a foreclosure sale may be made within one year after sale by the mortgagor or any subsequent lienholder by paying to the certificate holder the amount of his bid plus interest.

Section 7754, C. L. North Dakota, 1913.

Chapter 211, S. L. 1933, Section 1.

Section 8085, C. L. North Dakota, 1913.

Certainly, to allow a private person, the mortgagor, or any other redemptioner, to redeem for less than the amount fixed by law, is to take another's property for the benefit of

the redemptioner. This is taking the certificate holder's property without due process.

Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

Boeing Air Transport vs. Farley, 75 F. (2d) 765, 767, 64 App. D. C. 162.

The State, as holder of the certificate of sale, was no longer a lienholder, but its lien had merged into an equitable title to its property, defeasible only by redemption according to due process of law.

Harrison vs. Griffin, 32 N. D. 188, 155 N. W. 655.

North Dakota Horse and Cattle Co. vs. Scrumgard, 17 N. D. 466, 117 N. W. 453.

The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.

Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106.

Therefore, the Bankruptcy Act, Section 75 (s), to preserve its constitutionality, must not be so construed as to permit the redemption from a foreclosure sale purchaser and certificate holder for less than the state law under which he purchases guarantees—the purchase price plus interest.

II. The money loaned and invested in the certificate here involved, \$6,953.13, is a part of the school fund derived from sale of lands granted to the State by Congress for support of its schools.

In the State of Washington, the Supreme Court was considering the question whether or not an act of Congress mak-

ing certain lands theretofore subject only to preemption, subject to the general homestead laws, had the effect of making Sections 16 and 36 of each section granted the State for its schools subject to homestead entry.

"The two subjects are so dissimilar that it cannot be held, in the absence of any clear expression to that effect, that in the passage of the latter act, Congress had the former in mind, and was intending to withdraw the special exception granted these four states; and that having created an exemption from any form of public entry as to Sections 16 and 36, as one of the conditions of the proposal under which the privilege of admission was extended to the States (Washington, Montana, North Dakota and South Dakota), as soon as this proposal was accepted by the people and the constitution they had framed had been approved, and thus a solemn compact entered into between the States and the United States, whereby each contracted to hold inviolate the rights of the other, Congress sought to withdraw any portion of its proposal and to again restore these two sections to the public domain. To so hold is to our minds to accuse Congress of bad faith."

State vs. Whitney, 66 Wash. 473, 120 Pac. 116, at page 121.

The State of North Dakota, by its Constitution, accepted these land grants in the following language:

"The State of North Dakota hereby accepts the several grants of land granted by the United States to the State of North Dakota by an act of Congress entitled 'An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana and Washington to form Constitutions and State governments, and to be admitted into the Union on equal footing with the original States, and to make donations of public lands to such States,' under the conditions and limitations therein mentioned; reserving the right, however, to apply to Congress for modifications of said conditions and limitations in case of necessity."

Section 205, Constitution of North Dakota.

Is there any question that a contract or compact exists between the United States and the State of North Dakota, whereby each is absolutely bound to protect the school fund arising from the sale of the lands so granted? And is there any question that, to construe the Bankruptcy Act (Sec. 75 (s)) so as to allow a redemption from the certificate held by the State under which it is entitled to \$6,953.13, with interest, to effect a redemption by the farmer-debtor for \$2,800.00, is to violate that contract?

CONCLUSION

We conclude that Section 75 (s) of the Bankruptcy Act does not authorize a redemption from a foreclosure certificate holder for less than the state law provides, since such effect is in violation of the Fifth Amendment; and that to so apply the act to this case as to cause a loss to the State of over \$5,750.00 of its school funds, is to so construe the act as to violate the contract or compact between the United States and the State of North Dakota.

Therefore, the judgment of the Circuit Court of Appeals is erroneous and should be reversed. We earnestly urge that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

THE STATE OF NORTH DAKOTA,
Petitioner,

ALVIN C. STRUTZ,
Attorney General,

P. O. SATIRE,
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C. E. BRACE,
Assistant Attorney General,
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State Capitol,
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**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

F. E. McCURDY,
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**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
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STATEMENT OF FACTS

The Respondent accepts the Statement of Facts as set out in the brief of the Petitioner.

**RE-STATEMENT OF POINTS URGED BY THE
PETITIONER**

1. The Petitioner asks:

"May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made?"

We have omitted superfluous statement which assumes that such an Act would be depriving the certificate holder of his property without due process of law.

2. "Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant and its guaranty to protect and administer the funds arising from the sale of such lands as a trust fund."

ARGUMENT

On Point One, being on the right of the debtor to redeem for a less amount than that which the property was bid in by the holder of the mortgage under the provisions of 75 (s) of the Bankruptcy Act as amended.

We believe this question to have been answered once and for all by this Court in the case of

Wright vs. Union Central Life Ins. Co., 304 U. S. 502.

At page 514 of this case, the Court used this language which, we believe, is competent answer to the question involved and which is Point One, Subdivision "A".

"While there may be no relation of debtor and creditor between the bankrupt and the purchaser of his property at judicial sale, we think the purchaser at judicial sale does enter into the radius of the bankruptcy power of his debts. His purchase is in the liquidation of the indebtedness. The debtor has a right of redemption of which the purchaser is advised, and until that right of redemption expires, the rights of the purchaser are subject to the power of Congress over the relationship of debtor and creditor and its power to 'legislate' for the rehabilitation of the debtor."

"The person whose land has been sold at foreclosure sale and now holds the right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospects, either paying a certain sum of money or of being completely divested of their land."

"We think the provisions for the extension of the period of redemption comes clearly within the powers of the Congress under the bankruptcy clause" * * *.

"If the argument is that Congress has no power to alter property rights, because the regulations of rights in property is reserved to the states, it is futile" * * *.

"Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law." * * * "But if Congress, acting within its bankruptcy power, it may authorize the bankruptcy court to affect those property rights, provided the limitations of the due process clause are observed."

Also:

State of North Dakota vs. Szarkowski, 142 Fed. (2nd) 333.

State of North Dakota vs. Towner Co., 142 Fed. (2nd) 48.

Coming now to Point Two urged by the Petitioner which, as we see it, merely raises the question as to whether or not the Enabling Act, 25 Statute at Large, 762, and Article 9 of the Constitution of the State of North Dakota has any bearing whatsoever upon the question presented by Point One. The sentence which, we believe, the Petitioner had in mind is as follows, and is found in Article 9, the last sentence in Section 159 of the Constitution of the State of North Dakota and reads as follows:

"Every such fund shall be deemed a trust fund held by the state and the state shall make good all losses thereof."

We believe this clause has no bearing whatsoever upon the question under consideration for the following reasons:

1. There is no proof that the money was lost by an unwise investment.
2. There is a provision that the State shall make good all losses.

3. That very language contemplates that there will be losses.

4. There is no showing in this case that there is a loss or that one would ensue because of redemption and payment under the provisions of Section 75 (s) of the Bankruptcy Act as amended.

Counsel's argument, reduced to its lowest terms, merely means that if the State of North Dakota made a bad loan and lost money on it, that the State should be permitted, in violation of the Federal Bankruptcy Act as amended by Section 75 (s), to sell the land, carry it on its books at a valuation greater than its actual value and thus deceive not only taxpayers of the State of North Dakota but also deceive the United States of America, and thereby enabling the State to escape the liability to "make good" the loss thereof.

As the Respondent sees the situation, the money has already been lost, if there was a loss of principal on that loan, the school fund has been depleted to the extent of that loss, if any, on the bad loan. And the mere carrying of a piece of land on the books at a valuation greater than its real value cannot change the situation and no individual, much less the State, should be permitted to indulge in such juggling of figures to avoid a plain duty to "make good".

This case contains no elements or questions that could properly invoke the jurisdiction of the District Court and the decision of the Circuit Court of Appeals from the Eighth Circuit, we believe, to be final under a fair, reasonable interpretation of the rules and law relating to the decision of the Circuit Court of Appeals of the Eighth Circuit.

We respectfully submit the Petition should be denied.

Respectfully submitted,

F. E. McCURDY,
Attorney for Respondent,
Bismarck, North Dakota.

